

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

BACKGROUND PAPERS

(January 2006)

Law Reform Commission of Western Australia

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foreword

In December 2000 the Law Reform Commission of Western Australia received a reference to investigate the potential for recognition of Aboriginal customary laws in Western Australia. The Commission's terms of reference were wide-ranging and called for expert comment on a great number of discrete areas of law. As part of the research and consultation phase of the reference the Commission advertised a call for papers on matters relating to the practice and recognition of Aboriginal customary law and its interaction with Australian laws, particularly the laws of Western Australia. A total of 15 Background Papers were commissioned from highly regarded authors with particular expertise in their relevant field.

The Background Papers were published individually by the Commission throughout 2003–2005 and are now reproduced in this volume. Topics covered by the papers include Aboriginal women's issues; Aboriginal customary law and family law; Aboriginal customary law and the criminal justice system; the provision of Aboriginal interpreter services; Indigenous cultural and intellectual property; and Indigenous human rights and international law. A detailed case study of a north-west Aboriginal community was also commissioned. Opinions expressed in the Background Papers are those of their individual authors and are not necessarily endorsed by the Commission.

Heather Kay
Executive Officer
January 2006

Terms of Reference

Recognising that all persons in Western Australia are subject to and protected by this State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;
 - (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
 - (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000